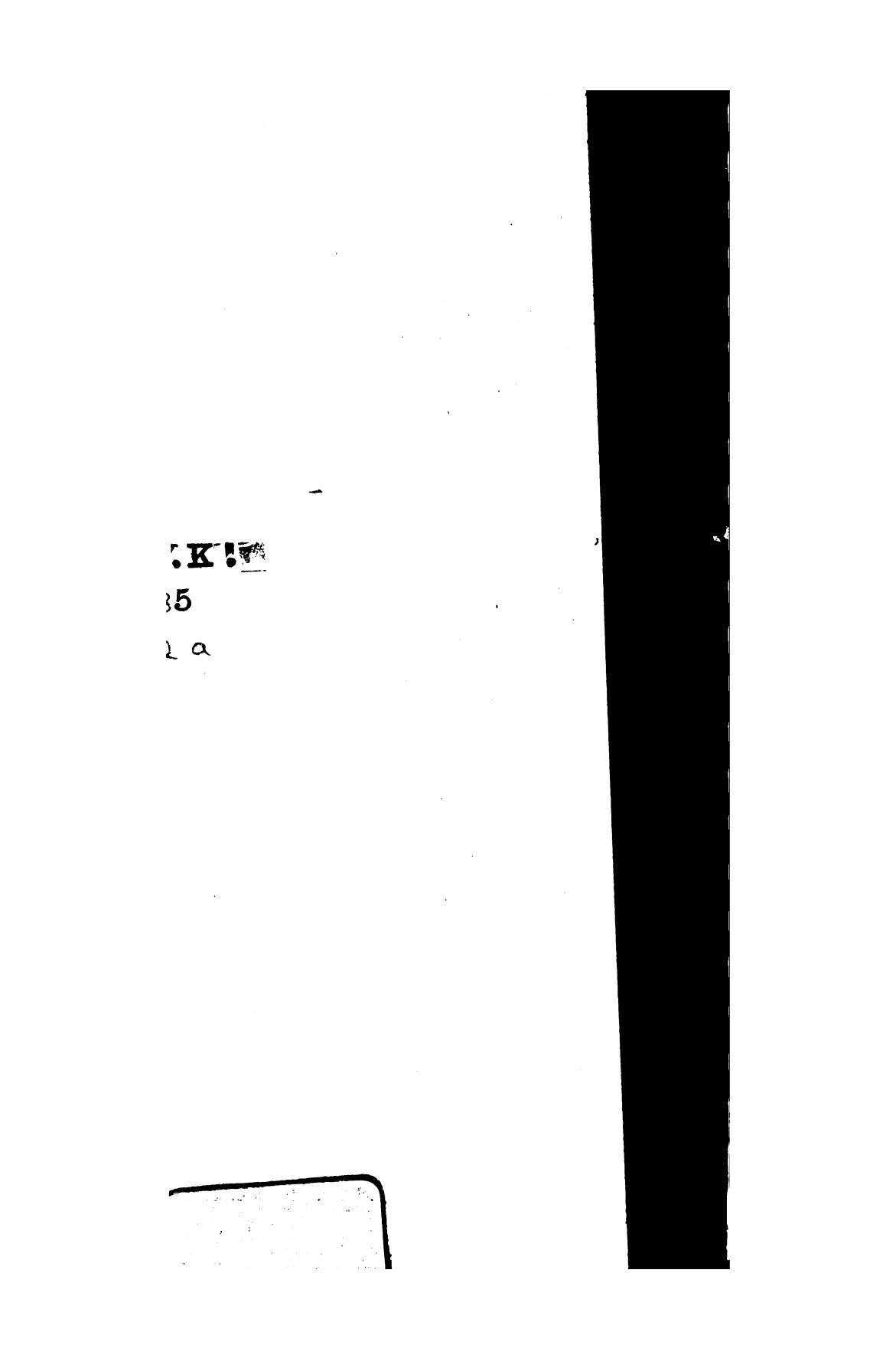

A FEW WORDS ON

THE LAW,

AS IT WAS: AS IT IS: AND AS IT OUGHT TO BE:

WITH SPECIAL REFERENCE TO

COUNTY COURTS SUITS,

AND

ACTIONS AT LAW.

BY W. FINLASON,
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Author of "Leading Cases on Pleading."

"Let us go back to first principles; to common sense and *truth*."
LORD CHIEF BARON – *Court of Exchequer, May* 27.

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A FEW WORDS ON THE LAW,

&c. &c.

"By far the heaviest items in bills of costs, are those which relate to the *proofs*; and particularly to *witnesses*."—*Report of Common Law Commissioners.*

"THE law" has long been proverbial for expense, uncertainty, and delay. An action has become abhorred: pleading, so much a by-*word*, that anything particularly shuffling is summarily stamped as "a piece of special pleading."

For three centuries it has been sought in some way or other to "roll away the reproach;" but that it has not been in the right way is clear, for in the reign of Queen Victoria remedies are being proposed for an evil, recognised under Queen Elizabeth, and lamented under Queen Anne. A new County Courts system, the *charm* of which seems to be that it is utterly *unlike* that of actions at law, has at last been set up; and people, carried away by the idea of cheap justice, content to find they have a jurisdiction with no pleadings and small costs, and ignorant that, of old, it was worked with *more* justice and less expense, by the *aid* of pleadings, clamour for its extension. Thus under the new County Court system, so utterly unlike its original, the time seems approaching when, relapsed into primitive barbarism, Sir F. Thesiger and Sir F. Kelly may be seen going down to the Hall, each with his "suite" of witnesses, to talk out a cause, like parties at a *piepowdre* court.

Anxious to prevent the consummation, the new Lord Chief Justice is to commence his career with more "New Rules." The Attorney-General brings in another bill for more amendments of the law. Mr. Cockburn moves for a committee to see if it *can* be amended. Meanwhile the evil increases and the "scandals of the law" are denounced with indiscriminating indignation.

All this could scarcely be if the course of law worked *justice*. But it does *not*. And why? Because it is not worked by *truth*.

Was it always so? No. There was a time when an action at law almost *infallibly* worked justice. And why? Because it was worked by truth.

To do justice the truth must be found; and it cannot be but by truthful means. Falsehood cannot elicit truth, nor further justice.

That the truth may be *known*, it must be told. And our ancestors made the parties in an action *tell* the truth: "the truth, the whole truth, and nothing but the truth." That was the *secret* of their system. We have lost it. And hence, to a great extent, it may be said, that with us "Truth fails; justice has perished out of the land."

But though the system was *simple*, it was *skilful* to be *truthful*. As Lord Coke said of law in general, "it was founded on *reason;* yet not *every man's* reason; but *right* reason:" the reason of reflective minds careful for the truth. The reason of irreflective and ignorant persons might lead them to say "Since what you want is the truth, the shorter the course the better; for the sooner you will get at it: just let the parties tell their story, and the truth will speedily appear." This is the system of the County Courts as they are now; not as they were of old. But, *whose* story? Parties suing and being sued are sure to differ; or there could be no dispute. So there would be *two* stories to be told. And it could not be known, *when* told, which was true. Each would be *part* of the truth; but both together would not be the "*whole* truth;" for they would vary. And it could not be known whether *either* party knew the whole truth: or *which* of them.

And *how* should the stories be told. Both together? as usual in the County Courts now. That would be barbarism; and was *deemed* barbarism a thousand years ago: although we are now relapsing into it, so that too often a *suit* becomes a *squabble*. Indeed, this, unchecked, would be too shocking even for the present day; and *some* seem-

liness is sought after. That there should be *one story at a time* is the next conclusion, not worth much, however, without another, that the first story should be told *in time* to be answered: which it could not be unless told *before* it had to be answered. This of course involves a written "plaint." Here is the *germ* of pleading. And *so* far, even the County Court system has gone towards a judicial character. There positively are "plaints," so that the party *sued* knows before he comes into court what is the story of the party suing: but as, though the story told may be quite true, the party sued may "put it to the proof," the "plaint" is, to *justice*, of very little value. It certainly has *this* use: it lets the party sued have *some* notion of what he is sued *about*, so that he cannot suppose it is about his *buying* a horse and find it is about his *selling* one. As, however, the party suing has to *prove* the story he tells, his plaint should show not only a story *true*, but a story *proveable*. What is true, however may not be *proveable*. And the party sued may *know* it to be true, but *hope* it may not be proveable. And if he have no real answer to it, and be not honest enough to say so, he will of course deny it, and as the phrase is "put plaintiff to the proof of it," and the proof might fail. And then *justice* would fail. And so it does fail very often. And so it *must* fail so long as there is unchecked power of "putting to the proof" what is true.

What would be fair or unfair for one side would be so for the other. And if the party *sued* had notice of the story to be told and proved against him, so should the party suing have, of the story (if there were one) to be told in *answer*; so that he might not come down to court confident that his story could not be disputed, and be discomfited by having all sorts of stories set up against it, and every thing to prove instead of *nothing*. This seems common sense; but it is a *stage* of common sense the present County Court system has not yet reached; so that there the party suing has to sue in the dark, not knowing what may be said to his story, except that he may be sure it will be denied; especially if there be no answer to it; so that he is not *safe* unless he go down

to court with a train of witnesses, prepared to prove all about it, and a good deal that has nothing to do with it; for no one can tell what *has* to do with it or with the real matter in dispute (if there be one), until both stories have been told: and if the party sued has none to tell, he will stand stiffly upon proof, especially if he know the story told against him to be true, and suspects that perchance proof may fail on some part of it, which in such case will be exactly the point as to which he will be most *critical*, while it may also be the part of the matter least material, and which he himself knows most about. It would be of small consequence, in cases where such a course would be most certain of success, that the party suing had *notice* that it was to be pursued; while on the other hand the party sued would be *assisted* in it by having beforehand time to search out the points on which proof may be most difficult.

To promote truth, there would be a necessity, therefore, for more than a mere statement of the story to be told on one side or the other. It would be of no use that one party told a true story if the other did not; and the object would be to make *both* tell the truth: each so far as he might know it. It was deemed that each must know *part*, and ought to disclose what he knew. It was foreseen, however, that he who desired not justice would desire to avoid thus disclosing the truth. And that this might easily be by putting a party to the proof of matter which he could not prove either through casual failure of evidence, or because matter more within the knowledge of the other side.

Now the object was attained by making *each party say in turn one thing at a time*. This may seem simple; but was *safe*. Each party in his turn rested his case on what he said. Therefore, of course, neither would say what was not material, if he could say anything better; nor what was false, if he could say anything that was true. This was held good as well of assertion as denial: of the part as well as of the whole. And hence a party could never be put to the proof of more than *one thing;* nor of anything which was *true*, unless it were *material*, and to which it was *impossi-*

ble to give any answer. In other words; a party was never put to the *proof*, except as far as material for the purposes of *truth.* Justice then could scarcely fail for want of *proof.* And, incidentally but inevitably, the pleadings were so short, and the proofs so narrowed, that the expense was inconsiderable, and the proceeding if not swift, was prompt; and what was far better—sure, certain, *safe*, and satisfactory.

It is beautiful to see how this simple system worked. "There is an exquisite subtlety, and the same is unjust;" there is also "*an exact truthfulness;*" and it was the latter which characterized the course of Common Law.

Put into form the system was this: The party *suing*, at the outset of the suit, and each party, at every other stage, stated *some single, substantial, matter of fact.*

Thus was it with the plaintiff's story: as, that the defendant had bought of him a horse for £25, and owed him the price: or had made him a bond for £50: or detained ten bags of his hops: or had entered his garden: or had not kept his covenant to repair a house let to him by plaintiff: or had lost goods, which he had received as a common carrier, according to the custom of the realm: or, that one, according to the custom of merchants, had made a bill of exchange, accepted by defendant, and endorsed it to the plaintiff.

In each of these cases it will be seen, there would be "some single substantial matter of fact:" *i. e.*, there was altogether some matter substantial: and there was not more than one matter which, taken *singly*, would be substantial. To make the matter substantial however, it almost always involved implicitly or expressly some secondary or subordinate circumstances. Thus there must have been in the horse case, a sale before the debt; in the bond, sealing and delivery as well as writing; in the hops case, not merely detention of hops but a detention from plaintiff; or in the house case, a covenant to repair, and a breach of it; or in the carrier case, a delivery of goods to defendant, according to the custom of the realm, and the subsequent loss; in the bill case, a drawing of the bill according to the

custom of merchants, an acceptance of it according to the custom, and an indorsement of it according to the custom. And in some cases this secondary fact or facts would (as the delivery and the loss; the covenant and the breach; the drawing, the acceptance and the indorsement) seem to be separate *facts;* in others (as in the sealing of the bond, the delivery of the goods according to the custom of the realm, and the drawing, acceptance or indorsement according to the custom of merchants) might seem to be, rather, several *incidents* of the same fact,—but still there could only be some single substantial matter; for in no case would there be more than a single matter, which taken *singly* would be substantial. Thus there would be no significance, in the fact, that a horse was sold, unless the sale resulted in a debt: or that a bond was sealed if not delivered; or that hops were detained, if not from plaintiff: or a house not repaired, if there were no covenant to repair it; or goods lost by a person who had not had them as a carrier: or a bill drawn, accepted and indorsed, if not according to the custom: on the other hand, in any case, there must have been *some single* matter which, *singly*, would be *substantial; i. e.* would, in the knowledge of the party sued, give a right of suit, save for something, also in his knowledge, which he could state. This, in the several cases just instanced, would be the debt, the bond, the detention, the covenant, the bailment, the entry, the acceptance, and in each case would be something *single* in point of time: (whatever essential incidents it might have:) and by itself in substance so far sufficient, that it showed, if not denied, at least that there was something to be answered; and that at that stage it could not be known what else *was material*, except by the party sued, who therefore must best be able to state it: while, unless it were proved, it could not be seen if there were anything for him to state. Whereas, with any other facts stated (as, in the case of covenant, the non-repair), it would *not* be so, since it would be useless to deny them unless the previous facts were true, and if true there must

(unless *all* were true) be some *answer*, and what that was the party sued must have known as well as the party suing. And if any facts thus subordinate were stated, they (as the breach of covenant) were not *substantial* for the main purpose of pleading, but for the subordinate purpose of *notice* of the case of the party suing.

Now, if there were any truth at all in the case of the party suing, he could scarcely ever fail for want of proof. For first, the party sued, as well as himself, could only say some *single substantial matter;* so that he could not say the story of the plaintiff was not true, and so put him to the proof of it; and *also* say it *was* true, and *answer* it: and hence, would never, if he *had* any answer to it, "put it to the proof." Then, next, he must say something substantial; and what was true of the whole was true of every part; so that he could not say as to all what was only substantial as to part; nor as to one part what was only substantial as to *another;* and hence he could not say, as to the horse case, that he did not buy such a horse; for it might be so: the contract of sale might have been for a horse thirteen hands high and one of twelve hands *delivered;* or it might have been for a price of £20 instead of £25; and so if stated in the plaint to have been for one of twelve hands, or for £25, the plaintiff might not be able to prove it: but this must be wholly immaterial if the party sued had kept the horse delivered to him, whatever its height: and if he owed any money for the price, he must have done so: and as he did not say that he did not owe any money, it was taken to be true that he *did* owe some; and he must have known *how much*: and hence his story was seen to be a shuffling one, and one in which he wished to succeed by failure of proof, on a matter not material to the suit; and therefore the plea would be put aside, and he would be told to tell a plain straightforward story. If he could show that he had refused to receive the horse offered, that might show that he did not owe the money; but then it was deemed that if it were so he could *say* that he did not

owe it, and show how and why. Or if the sum were only £20, he would say as to so much that he *did* owe the money, and was ready to pay it; and as to the rest, that he did *not* owe it. And if he merely said in general terms that he did not owe the money as alleged, it was taken that he meant truly and fairly that he owed *none*—nor on the sale of *any* sort of horse, for if otherwise his story would not be true or fair; and so if it turned out that he owed *any* money on the sale of *any* horse he failed, as for his false story he deserved. Thus the party sued could not defeat the plaintiff as to *any* part by putting him to the proof of what was untrue but immaterial, nor as to all by putting him to proof of what was true, but material only as to *part*.

On the other hand, he could put the party suing to the proof of what was the single *substantial* matter in his story, and all essential incidents of it, as if he denied in the above case that he owed the money, it must have been proved that he had bought some horse for some money; or if he said he did not neglect his duty as to the goods as alleged, it must have been proved that they were delivered to him and taken by him as a common carrier; or if he said he did not enter the plaintiff's land or detain plaintiff's hops, it must have been proved that the land was in plaintiff's possession, or that the hops were delivered by or detained from plaintiff; or if he said that the bill was not indorsed to plaintiff, it must have been proved that it came to him according to the custom of merchants, *i.e.* in the customary course of trade. For otherwise nothing substantial would be shown; and although it might be that in each case all that was so stated, the party suing could not *show*, and so in some instances he might fail for want of proof of what was true, that would be only where the very foundation of the case failed; and therefore the rarest possible sort of case. The fact that it *might* occur however, only rendered the courts more anxious to make it as rare as they could; and hence they were careful never to let the party suing be put to the proof, except as far as was necessary for the purposes of truth. Thus the party sued

could not in the hops case say that the hops were not the plaintiff's; for as it was stated that he detained them from the party suing, and he did not deny that, nor pretend any right to detain them, it was taken that he did detain them from the plaintiff, and had no right so to do; so that the property was as to the party sued immaterial; and hence it was seen that he was telling a shuffling story, and seeking to succeed by failure of proof, on a matter not substantial to the suit. And so if he said the land was not the plaintiff's. So again if the carrier said that the goods had not been lost exactly as alleged, for this would have shown that he had received the goods as a carrier, and who should know better than he what he had done with them?—and why should he ask the party suing to show it which *he* might *not* know? Therefore it was seen that *this* also was a shuffling story, and that he was seeking to escape by a casual failure of proof as to what *he* had done with the goods; and he was told to show that himself. And so if the acceptor of the bill had said, "True, I accepted it; but the drawer did not indorse." That might be so; and yet the bill might have been indorsed to the plaintiff, and he might be the lawful holder; and the acceptor ought to show how the bill got out of the hands of the drawer whom he must know, but the indorsee might *not*. On the other hand the party sued had a right to say that the drawer defrauded him of the bill, and that would be substantial, because the party suing could show in reply that he took it (as he well might, if the bill was indorsed in blank) from another party, in the usual course of fair trade.

Thus, in every case, the principle followed was that of plain truth, and a party sued was not permitted to put to the proof just what he pleased; because he would not want to put anything to the proof if he had any answer; and if there were nothing in the story told by the party suing to answer, it would be enough to put him to the proof of the substantial fact which formed the foundation of his case; and if that were true, the party sued, it was considered,

should say something substantial in answer, or confess he had nothing to say.

On the same principles, the party sued, as he could not both say the story of the party suing was not true, and also say something in answer to it, so neither could he set up *two* answers to it. Thus, he could not say, in the sale case, "I never owed you money:" *and* "I have paid it." Or "I have paid it," *and* "I was an infant." Nor in the detention case, "I don't detain your hops," *and* "I have a lien on them." Nor in the trespass case, "I did not enter the land," *and* "I did so because it was the land of one who allowed me." For if in each case the second plea were true, it could not be truly said that the plaint was *not* true; so that if the second plea were true the first must be false, and if the first pleas were true the second must be false; or if even *both* could be true, both could not be material. And if there were doubt as to which was true, in *fact*, it was better to *find out* before pleading than after: and if there were any doubt as to whether the defence, though true in fact, were *good in law*, it would be better plainly to set forth the facts and ask the opinion of the court upon them.

If there were any *answer* there would, it has been seen, be no necessity to *prove* what was to be *answered*. And the plea simply stated *some single substantial matter of fact: i.e.*, substantial to the matter of the *plaint*, as, in the horse case, that a bill was given: in the bond case, infancy: in the covenant case, performance: in the bill case, that drawer defrauded the defendant of his acceptance; in the hop case, that before defendant had them they belonged to one A., by whose leave he detained them: in the trespass case, that before defendant entered, the land was the freehold of B., by whose leave he entered. In each case it did not at all appear that the plea *must* be an *answer:* thus, in the bond case, the defendant when of full age might have re-delivered. But so it was with the plaint: thus, in the horse case, the money might be *owing* but not *payable*, on account of credit. And as with the plaint, so with the plea, it was seen that it would be of no use to state other facts, until the first and

foundation fact was admitted to be true; for it might *not* be; and thence the other facts would at least be useless; or all *might* be true, but the other facts might not be *proveable;* and then the party sued would be sure to "put them to the proof," and defeat the suit for failure of proof, on a matter not at all under dispute: thus if, in the bond case, the plaint had to state that the defendant was of full age, defendant would be sure to put him to the proof of it, and triumph in his failure, although there was no real doubt or dispute about the matter. So, in the hop case, if plaintiff had to show his property to them, he might not be able to do it; yet they might be his, and defendant have no sort of claim to them: and so again justice would fail through failure of proof. To limit the possibility of this in the case of the party *sued*, as in the case of the party suing, he only had to state some single matter, in the knowledge of the other—at least as much as in his own, and which if not true, he could put to the proof; and which if true, he should be in a position to reply to. Thus it might be that the plaintiff in the bill case had, notwithstanding the fraud, taken the bill under such circumstances as that he could recover: or in the hop case, that he had purchased of A.; or in the trespass case, that he had a lease from B.; but then in such case the plaintiff *must* know if that were true, and defendant might *not*, and so plaintiff should show it in reply.

With the plea as with the plaint that substantial matter alone could be put to the proof, which if *dis*-proved or *un*proved, left nothing in it to be answered; and *totally* destroyed it. Thus in the hops or the trespass case, the plaintiff could not have put defendant to the proof of his having the consent of the owner, for it might be that he had *not;* and yet he might have, or plaintiff might *not* have, a right to the possession of the goods, for the defendant might have a lien on the hops, or a licence to use the land; and if plaintiff could neither deny that the ownership had been as alleged, nor show that *he* had acquired it; it was rather just that he should show how otherwise he had a right to

sue, than put the defendant to the proof of the particular mode in which he acquired *his* alleged right to the possession; because from the fact that plaintiff ventured not to state *his* right, it was to be rather inferred that he *had* none, for if defendant proved the leave of the owner, the owner might have no right to give it, as the plaintiff might have a lease of the land, or a lien on the hops; and if it were assumed that he had *not*, it could only be from his not *saying* that he *had;* and on the same reason it might be assumed that he had no right at all to the purpose.

If the plaintiff had any real reply to the plea, he stated it on the same simple rule which applied equally to plaint, plea or reply—*some single substantial matter;* as in the horse case, bill returned; in the covenant case, non-repair of the roof; in the bill case, that he took the bill from C. in the fair and usual course of trade, with good consideration; in the hops case, that A. had sold to him; in the land case, that B. had let to him. Then defendant might rejoin; in the covenant case denying, and putting plaintiff to prove the want of repair; in the bill case putting plaintiff to prove that the bill was taken with consideration or *offering* to prove that it was taken with actual notice of the fraud; in the hops case putting plaintiff to *prove* that A. had sold; or offering to prove that he had fraudulently *purchased* of the party who deposited with defendant; and in the trespass case putting plaintiff to prove the lease to him; or *offering* to prove that B. had authorized him to enter to distrain for rent in arrear. Then plaintiff might, in the hops case, deny and put defendant to prove the fraud; or in the bill case the notice; or in the lease case the right to distrain: and so in every case the party would go on, until a fact, on the assertion of which the one was prepared to rest his case, was met by a denial on which the other was prepared to rest *his.*

Now the inevitable effect of this course was, that the dispute was decided on some single matter; and all modern writers on pleading put this forward as *the object* of the science.

But though *an* object, it could scarcely have been *the* object; for though it might be a good thing to decide the dispute on one point, it would not be so if that were the wrong point—a point quite immaterial, either through its not being *the* point in dispute, or through there not being *any* point in dispute; or if it were a point which the *wrong* party had to prove—the party who could not, instead of the party who could—the party whose case it was *not*, instead of the party whose case it *was*—the party who had nothing to do with it, and knew nothing about it, instead of the one who had everything to do with it, and knew all about it. The object was therefore to get at the *truth*, and to get each party rather to *tell* the *truth* than to "put it to the proof," and to prevent either from denying something which *might not* be decisive of the case when he could *disclose* something that *must* be so. Thus it was provided that neither party should be put to the proof where it was not necessary for the purposes of truth, and that either should be put to the proof where it *was*. The effect was, as we have seen, that a party was *never* put to prove that of which it was not properly to be presumed that he must know whether it were true or not, and be *ready* to prove what was *true*; nor ever except in instances where it was the foundation of his case, and where he must have known he would have to prove it. The practical result was, that a failure of justice, through failure of proof, was almost always impossible; *always*, except where there was a failure of *prudence*. An accidental, but valuable, result was, that as the pleadings were short and simple, there was the smallest possible expense, and the least possibly delay. Such *was* the law. Had it continued so there never would have been complaints of the law's delays, nor a craving for a cheap and coarse sort of semi-barbarous judicature; actions at law would have never fallen into odium, nor "special pleading" ever have become a term of reproach.

But it did *not* continue so. It was too *simple* to be let *alone*. It seemed that what was so simple could *not* be so efficient; it was lost sight of, that the secret of its efficiency lay in its simplicity, seeing that it was the simplicity of *truth*: for

truth itself was lost sight of: and in the pleadings each were considered by *itself* for the sake of the *pleading;* and not of their purpose and principle, nor with a view to their alternate and reciprocal effect for the attainment of their ultimate end. Hence they were soon conceived too short to be sufficient, and, each being *scanned* by itself, apart from its place in a *chain*, they were construed critically—then captiously; until the "exquisite subtlety" was substituted for the exact truthfulness.

At last, so entire was the oblivion of the real principles of pleading, it came to be considered that whatever a party's pleading stated must be proved; and that whatever it could be suggested he *might*, under any circumstances, have to prove, he must plead; totally irrespective of any regard to what was reasonable or requisite for the purpose of truth; or of the principle that a party should not have to prove anything not necessary for that purpose; and that nothing could be so which was not decisive of the matter in dispute. Hence, in the horse case, defendant would be allowed to say, to the party suing, generally, "I do not owe the money" (which fairly meant, "I deny *any* debt on *any* sale of a horse at all"), and then at the trial to put plaintiff to prove the exact amount, say of £25, and to defeat him *in toto*, upon his casual failure of proof as to some part of the amount, say *five shillings!* or again, in the trespass case, by saying, "I entered not your close," and by the land turning out to be called Blackclose, when it had been by mistake described in the plaint, Whiteclose, without its appearing in either case that the mistake was of the smallest materiality to the matter in dispute, or that there was any matter in dispute at all! With "exquisite subtlety," but no "exact truthfulness," it was said, that a contract for £24 15*s.* could not be the same as one for £25; nor a close called Black be the same as one called White; so that the defendant had disproved the declaration! As if that which was not *in all respects* the same, might not be substantially the same! or, as if a contract for £24 15*s.* might not by mistake be *de-*

scribed as for £25! or, as though if it were wrong to call "White" Black, what was rightly called Black, might not be *wrongly* called White, without being any the less the *same!* or, as though the Courts were to try the pleadings, not the *cause;* the manner of *describing* the matter in dispute, instead of the matter in dispute!

With wretched consistency of sophistry a defendant was prevented from pleading, in such a case,—that the price was £20, which he tendered; or that the close was called Blackacre, and was his freehold; so that having been permitted to state what was false he was now prevented from stating what was *true.* With wretched *in*consistency things came at last to such corruption that he would be allowed to say in the hops case that they were not the plaintiff's; which, as he thus admitted, that he detained them from him, and also that he himself had no claim to them, either meant nothing, or meant that they were not plaintiff's property, which must be immaterial; or, in the trespass case, to say that the land was not plaintiff's, which must in the same way mean, "I had no business with it; and I entered upon your possession, but pray prove your right to it!"

Then, the simple rule of each pleading, stating some single substantial matter of fact and not more, being lost sight of, with it was lost the sole certain standard of "sufficiency," and it was soon conceived that pleadings so short could not be "sufficient:" and thenceforward was substituted the absurd, arbitrary, uncertain idea of *certainty;* than which (as has well been said) nothing could be *less capable of certainty:* so that the *degree* of "sufficiency" or "certainty" required in a pleading as to the facts to be stated in it, varied with the particular cast and character of a judge's mind; and according as he was more or less captious, critical or subtle, would he deem the pleading "certain" and "sufficient;" till thus, under pretence of making pleadings sufficient, they were made inefficient. It was impossible ever to be *certain* what was "certain;" and so *sufficient*; either in a plaint, or a plea, or a reply; or what must be stated, or might be denied. The grossest inconsistencies, absurdities,

and iniquities consequently crept into pleading. One inconsistency is that whereas the obligation of a carrier to his employer, and of the acceptor of a bill to an indorsee both rest on *custom*—the plaint against the former it is still considered should state that he was a *common* carrier, *i. e.*, according to the custom, &c., while against the other it is thought that it need *not* be alleged that the bill was drawn, accepted and indorsed according to the custom of trade. The reason and the result are equally curious and instructive as illustrating the process of corruption. The absence of any certain standard of certainty and sufficiency led to an absurd particularity or prolixity; and the custom of merchants was set out at needless length; till, in an evil hour, the abuse was (as ever has been done in respect to pleading or law), *cured by another*, and a far worse one: for it was allowed to omit stating custom at all. The result of this has been that an indorsee was not obliged to state as part of his case, that the bill was indorsed to him according to the custom: it ceased to be considered part of his case, and he no longer had to *prove* it as such. So that an acceptor, where the bill has not been indorsed to plaintiff in the common course of trade, (and therefore the plaintiff *has no right to sue*,) cannot put him to prove it was so! although, if it were so, the plaintiff must know and could easily prove it; but it is hardly ever possible for the *defendant* to prove that it was *not* so!

The result of this wretched, inconsistent, and uncertain system was, that the *onus* of pleading and proof, instead of being settled by a simple standard, was left to be adjusted by a strife and struggle of subtlety between the parties themselves, who were reciprocating and retaliating on each other the same arbitrary requisitions of uncertain "certainty," and at every stage raised all sorts of objections to each other's pleadings, in order by a retaliation of *wrong*, to remedy the mutual deprivation of *right*. And if the cause went to *trial*, the chances were, that there was a failure of justice through a failure of *proof:* if to *argument*, that there was a failure of justice through a failure of *form*. The courts

having no *standard* of the sufficiency of the facts to be stated, were constantly causing miscarriages at trial, by requiring proof of what need not have been stated; or on demurrer, by requiring facts to be stated, which needed not to be *proved*. Subtlety suggested facts which might in *some supposed* case be essential; and they therefore were required to be stated and shown, without any reference to what was required for the purpose of truth in that *particular case* as appearing on *those particular pleadings*.

Then came remedies, worse than the evil, and perpetuating and propagating it. An act of Elizabeth recited, that "excessive charges and expense delay and hindrance of justice had" arisen in actions, "by reason that upon some *small mistakings* or *want of form*, judgments are often given otherwise than the *matter in* law, and the very right of the cause doth require" (which could not be according to the law, at least, as it *had* been; since that attached no importance at all to "mistakes" or want of form, not *material to the matter in dispute*); and then enacted, that thenceforth the judges should not regard any imperfections, or defects, or want of form, *except such as should be specifically set down as "objected to*;" which of course was a legislative recognition of the validity of any such objections, however immaterial to the matter in dispute, provided they were thus specifically shown! whereas, such objections could not by the Common Law be made at all, *without being* "specially shown;" and were utterly futile, unless specially shown to be material to the matter *in dispute*. And afterwards, an act (of Anne) was passed, yet more aggravating the evil it professed to remedy, by enacting, that for "imperfections, omissions, or defects" not specially shown and objected to, no judgment should be given against a party, if *sufficient matter* appeared on his pleading, to enable the Court to give judgment for him on the "very right;" as if at Common Law, *any* objections could be taken, if *not* so specially shown; or as if whether so shown or not they were of any force if "sufficient matter" appeared to show the "very right!" These Sta-

tutes, however impliedly, enacted, that this was or *should* be otherwise, and established "the *exquisite subtlety*," in the place of the "*exact truthfulness*." It is not surprising that Sir M. Hale had to complain, that "judges and pleaders had become too curious," and that, because "the science of pleading had degenerated from its primitive simplicity," "many miscarriages of causes occurred, upon small and trivial matters in pleading." And as the very purpose of the science had in his time been lost sight of, it is scarcely surprising that the evil which a Hale had denounced, a Holt did not remedy, and a Denman had to deplore.

Thus in the trespass case, if the defendant plead, (as before) that at such a time, before his entering into the land, it was the freehold of one B., and that he entered with his consent; (*i.e.*, that in *some* way he had *entered under* him:) it is held a bad plea, but "sanctioned by custom," and is so construed, that it is made useless, because, through oblivion of the principle on which it is pleaded, (that one single substantial *allegation to be answered*, should be stated, and that nothing in it should be put to the proof but what *must* be decisive,) it would be deemed a substantial part of it, and the plaintiff would be permitted to put to the proof, that the freeholder consented to the entry, which *might*, whether proveable or not, be utterly immaterial, since the freeholder could have had no *right* to give such consent if the plaintiff had any title to the possession, though, as he did not state that he *had*, it must be assumed that he had *not*; and on the other hand, if the freeholder had *not* given his consent to the entry, the defendant might have acquired, under him, a right to make it, and thus the plaintiff would have no right to resist it; and yet, on the present system of pleading, might *recover damages* for it, by reason of a failure in proof, of what was quite immaterial to the subject of the suit.

Then in the hops case, if (as in a recent case) a wharfinger were the party sued, and he had them from a party who had been juggled out of them by a colourable sale; and if he pleaded (as in that case he *did*, equally in accordance

with common sense and common *law*,) a plea, (quite analogous to that just cited, of a plea of freehold in a third party) that before he had the hops they were the property of one M ——, by whose authority he detained them; it would be very likely held, as intimated in the case alluded to, that it was a bad plea; and, though quite as ancient and correct as the other, *not* "sanctioned by custom;" or if deemed good, it would be (as in that case) construed to mean what it did not say, and what it would not be sensible that it *should* say. It would be either said to be "insufficient" for not stating, or unproved by reason of the not *showing*, in whom the property was, down to the time of the detention, although the wharfinger might not know; whereas the party suing must know whether he had acquired any right to them, and as he did not say that he had, it was to be assumed that he had not, as if it would be *more* fair for him to state, how he came to have any right to the goods, which he must know, rather than the wharfinger, who might not, and who would have to plead in the dark, and be unable to tell whether to set forth that there was *no* transfer of property to plaintiff, or a collusive one. So in the bill case, if the acceptor pleaded that he was defrauded of the acceptance, though plaintiff took it *through* the party who thus defrauded him, the courts would say this was not "sufficient," and that he must also state that plaintiff took the bill "with notice," "or without consideration." But the defendant does not and cannot know which of these things was the fact, or whether the bill was duly endorsed at all, so would be forced to plead in the *dark*, and there would be three chances to one that he chose the wrong defence, or that if he chose the right one, however true it might be, he could not prove it.

To give defendants even a *chance*, it was found necessary to make another inroad on the principle of *truth*; and another Act of Anne was passed, enacting that it should "be lawful for any defendant with the leave of the court, to plead as many several matters as *he* shall think necessary for his defence," the practical effect of which has been not only to increase and aggravate every evil that existed, but almost

utterly to destroy the truthfulness of *pleading*, so as to *totally* prevent its fulfilling, systematically, the purposes of justice. Because under this Act a defendant *may* (and of course takes care to) put the plaintiff to the proof of every matter stated as part of his case, (as in the bill case the acceptance and the endorsement,) and takes thus every chance of defeating him through a failure of proof as to what is perfectly true, and no matter of dispute at all, and also is allowed and *does* attempt to *answer* it, (as in the bill case, by pleading fraudulent indorsement, &c.,) in every imaginable way. The latter liberty has been already shown to be essential to give defendant who is forced (as explained above) to plead in the *dark*, even a *chance* of success; and after all it *is* but a chance, for the corruption of pleading having caused it to be taken as the rule, that a plea must, as the phrase is, "disclose a full defence," irrespective of any consideration as to what may or may not be matter within the knowledge of defendants, or may or may not be properly proveable by him or material to the matter *in dispute*, defendant has in each plea to state what may on *the face* of it make it a complete answer, although utterly unproveable by him, and immaterial to the matter in dispute; so that practically, the only effect of the statute is, to allow him to plead as many unfair pleas as he likes, instead of one *fair* plea; as many as he pleases which he cannot possibly prove, not one which he *can* prove: as many as he pleases to put the plaintiff to prove what is true, not one to put him to prove what is *not* true; in fact as many false pleas as he likes, not one which is *true;* a lottery of bad pleas, of which one may by chance succeed.

Thus, in the hops case, defendant could, as in the recent case he did, deny and put the plaintiff to prove everything that was admitted to be perfectly true: that is, the amount, value, possession, and detention of the hops; and also to invent, with necessary ingenuity, half a score of special pleas, putting a supposed and possible defence (founded on right of stoppage *in transitu*) on the part of the unpaid

original vendor, in every possible form; in not one of which was it probable that he could prove it; simply because he had absurdly to plead about matters not in his knowledge but in plaintiff's. But there was one plea he with difficulty obtained permission even to plead; and that was the only plea he ought properly to have been permitted to plead, because the only plea that was true or fair; or which could possibly elicit the truth and attain justice: the plea above alluded to, a plea which was the common plea in such cases for *centuries*, during which pleading was pure; but which now, pure pleading being obsolete, was unknown, hardly allowed at all, and then only upon terms which rendered it, as it turned out, absolutely useless for its sole purpose; for the terms were, that the plaintiff should *not* be forced, as he properly ought, to reply to it by stating how *he* got the property in the hops. This was absurd enough, for the plea stated only what was known to be perfectly true and easily proveable; viz., that at such a time, before the defendant took the hops, they were the property of one M——, with whose consent he took them. The plaintiff simply and in general terms *denied* this, and it was proved. But the court refused to give defendant judgment, because he had not proved what he could not prove, that the property remained in M—— down to the time of defendant's detaining the hops; a matter perfectly immaterial unless plaintiff had acquired the property; and if he had, it was for him to plead, and prove that he had; and as he had not done so, it was not to be *assumed* that he had, and in point of fact he had *not;* for, though there had been a transfer to him, it was colourable and collusive with a fraudulent vendee; but the defendant, the wharfinger, could not prove this, and if he could have done so he was not *called* upon to do so, since the plea stated it not; but the court held that it ought to have been stated: or ought to have been proved though *not* stated; and though the plea was in the precise form in which it had been pleaded, from the time of the first William to the last. And judgment was given against a party who had proved the only plea which at common law, he could have properly pleaded!

So in the bill case, the defendant can now(1) "put the plaintiff to prove" the acceptance, and (2) the indorsement, both of which are true, but by some chance one of them may be unproveable; and then (3), plead that the acceptance was obtained by fraud of the drawer, through, or from whom plaintiff took it with notice of the fact: (4) that the acceptance being thus obtained, he took it without consideration:—both of which pleas may be true, but neither of which defendant can prove. And thus a *lottery* of four pleas—two of them false, two of them true, is permitted; with the *chance* that one of the true pleas may be proved; with an equal chance that one of the false pleas may be proved; and with the certainty that in either case law is perverted or justice will fail; for in one case the justice will fail though truth do *not;* or in the other, justice will fail through the failure of truth.

But again, supposing *none* of the pleas true, defendant can nevertheless plead them, and would perhaps be all the more likely so to do. And here again, in whatever event, justice would be sure to fail; for if the plaintiff recovered (as he might *not*) after having been put to the proof of every thing, he would have run a great risk and incurred a great delay, and considerable costs beyond what the defendant would have to re-pay him.

Nor is this all; the evil has not stopped here; but the system has gone on producing perpetually fresh fruit. Nine-tenths of the pleas pleaded in early times would now be deemed bad, and the pleas which a defendant is now compelled to plead would be pronounced "most perilous pleading" by the men of old. When defendants have defences to state, the onus of pleading cast on them under the present corrupt system is such that they justly seek to *evade* it, by artificial or artful pleading, the necessity for which, strange as it may sound, is usually, or at least *often*, greatest, when the belief of the justice of his case is strongest; for just in that case will he be more apprehensive as to the possibility of failure in *proof*, and more anxious to avoid it; and more sensible of the injustice of exposing him to the risk, and less scrupulous as to the

exercise of any ingenuity and subtlety to shift on the plaintiff the onus of pleading and proving what by law he *ought* to do, but by the present system is allowed to *escape* doing. Thus art and all but trickery are necessary to promote *truth*, in a system not *founded* on truth.

To cure this fatal and fundamental fault by arbitrary regulations and contrivances, as it was the first, so it was the *last* species of remedy proposed. Some years since new pleading acts and rules were set forth, which perpetuated the evil, if they repressed its *excess:* for they recognised the right of defendant to set up any number of defences he pleased, *true or not true,* fair or not fair; and while providing some restraining regulations, carefully *excluded* the case of pleas relatively inconsistent, and expressly *allowed* pleas unheard of before, and on the face of them equivocating: (exactly the cases, one should imagine, in which the leave to plead several defences must be a licence to defeat truth by falsehood,) the effect having been an immense multitude of contradictory and perplexing decisions.

And then as a natural consequence of this licence to falsehood, which, as it is *often* used to defeat or delay justice, is of course, always *suspected* to be so, the honest and the dishonest being thus inevitably confounded together;—if the defendant object to the *reply* to his plea, as in the bill case, on the ground that it puts on him the burden of proof, which ought to be borne by the plaintiff, it is always vehemently suspected that the objection is for delay: and the prejudice is increased by the corrupt system that has long existed, of making parties pay costs upon amendment, the effect of which is twofold; to deter parties from amending when they fain *would,* and to throw upon a party "demurring" an ugly sort of suspicion of his having an eye to costs, rather than a zeal for his client, a care for good law, or a taste for correct pleading. Hence, as one evil always begets another, a pernicious practice has grown up of setting aside demurrers, chiefly to *replications,* (on the demurrers to which the issue of a cause often depends, as it decides the *onus probandi,*)

as "frivolous," by single judges, amidst the hurry at chambers:—of which it is enough to say that, except as a clumsy check or corrective of a vicious system, it never could have been conceived of, so utterly destructive is it of justice. It has a *show* of justice, for it seems plausible to set aside a demurrer as "frivolous," or an objection as "technical." But it may suffice to show how shocking is the system, to state, that many instances could be adduced in which demurrers set aside, or all but set aside at chambers, as "frivolous," have been ordered by the Court to be, and have been argued and *held good*; and in many more, which have been set aside, (without remedy, because at the opening of the long vacation,) counsel have *conscientiously considered* that they have been so, and that gross injustice has been done. The inclination, however, is to deal with the defendant summarily, in this spirit, for which the present complicated system affords every facility; the penalty, for breach of all sorts of *arbitrary* regulations, in the construction of which every person must differ, being—*final judgment* against the party! So that in real truth, the cause is entirely at the discretion of a judge of chambers, in every case in which a defendant knows there is a defence he could sustain if the plaintiff were forced to prove *his* part of the transaction, and in which as he can *not* be forced to do so, defendant almost infallibly fails. If he have no defence and confine himself to putting plaintiff to prove every part of his plaint, very likely he may succeed, through a casual failure in plaintiff's evidence; and *this* is thought perfectly fair and proper; whereas if he seek, by insisting on good pleading, to "place the saddle on the right horse," and make the plaintiff disclose what he knows and defendant does *not*; this, though requisite for *truth*, will be deemed to be only "for delay," and he is probably put *hors de combat* without remorse.

Practically, the result is that nine causes out of ten go to trial in a way utterly irreconcilable with justice, either on the wrong matter, or in the wrong manner; either on a matter not in dispute, or by means of forcing a party to

disclose what he does not know: or to prove what was known to be *true*. And thus, if justice succeeds it is by *chance*, not by science: and the wrong party triumphs in the right way or the right party in the wrong way. Thus, too, pleadings are prolix but not precise, and these are made up into useless "records," with expensive engrossing, and infamous fees; and perplex the jury and irritate the judges and make such a mess of the "record" that it is a hard matter to enter the "findings" on the different issues, or to make out what the issues are; and enormous expense is incurred for witnesses to prove all sorts of points; never really matter of dispute at all; and put to the proof not for the sake of their being proved, but in the hope of their *not* being proved. And amidst the confusion, the real matter in dispute (if there be one, which very likely there is not) is lost sight of, or is shuffled over unsatisfactorily; so that there are expensive motions in court to correct the errors of *nisi prius*: perhaps issuing in a *new* trial; or even a *new* course of pleading, as likely to be as little decisive as the former! Such is the law *as it is*.

No marvel that people "out of doors" murmur, or scoff, and clamour for more "County Courts" law, and that not merely these (as King Henry VIII. used to say) "brute and inexpert folk," but even men in the profession, of fine intellects and lofty ideas of moral rectitude, finding the present system so little satisfying their requisitions either of intellect or morality, and not aware how much it is at variance with the science of which it has usurped the name, confound (as usual) the present with the past; the corrupted good with the essentially *bad*: law and pleading as they *are* with what they *were* and might be. They have every excuse, or the text-books on pleading do not expound or exhibit a science founded on *truthfulness*: and without reference to *this* as its leading principle, its ancient purity and integrity, must be but dimly discernible through the "dust of ages," save to those to whom it is a "labour of love" to study decisions of distant times, when, upon that principle, it was founded.

Among those who practise pleading and who would fain see it as it once was, a *science of truth*, there are some anxious to have it shown how it *was* so; and how it may be so once more. To make it so, the judges, some years ago, did much: at least to prepare the way for the restoration of *pure* pleading. They then could do no more than lay down rules in restraint of the vices of the present system, and *recommend* a recurrence to the old. They thus, no doubt, checked many gross abuses; but, they did not proceed upon the real *principles* of pleading, and so necessarily left much to be reformed: and until these once more are seen to be the principles of *truth*, pleading will never fulfil the purposes of justice; nor can those who love justice be satisfied with anything short of that which once *was*— in times when pleadings were so *brief*, that it must be a rare *placitum* which would occupy one of these pages, and so plain that he who ran might read! Happy days! when the Chief Justice could take home in his pocket all the "Demurrer-books" of a Term, or all the "Records" of an Assize.

What is requisite to restore these times, is, that pleading should be *carried out:* that its principle should be understood to be truth: and that it should be *enforced.* Some, even of the leaders of the profession are for retaining it *nominally*, but doing away with it *really*, removing all power of enforcing its purity and integrity; and, because objections to pleading have often been technical, would prevent any objections being made at all, instead of leaving full liberty to *object*, but taking care to give *effect* to no objection unfounded on *truth.* Pleading having been dealt with for its own sake, apart from its proper purpose, justice, and its principle, truth, and the results of particular cases having been elaborated into general rules, afterwards arbitrarily applied, quite irrespective of their real bearing on the justice or truth of any particular case, and this having produced the substitution of technicality for truth, there is now a natural tendency to forget that these rules could have no technicality if interpreted according to the truth. Hence some say, "Do away with special demurrers; abolish your rules of certainty, materiality," and so forth. Why this

would be really to render it impossible that truth and justice should even by *chance* succeed. For what is a special demurrer? An objection to an untruthful pleading. What are the rules, of materiality, &c.? Rules of truthfulness. To do away with these things, then, would be to legalize generally untruthful pleading: and if it be said demurrers have been decided, and the rules construed, upon technicalities, apart from the requisitions of *truthfulness*, the answer is, that is *contrary to law*;—it is *not* pleading; it is a gross abuse of pleading; for pleading is founded on truth, and, whenever an objection is given effect to which is not founded on truth, the first principle of pleading has been perverted. For instance, when a party sued, not knowing exactly the law as applied to his case, sets out the facts fairly and truly, and asks the opinion of the court upon them; an objection to that way of pleading, as "argumentative," is all nonsense—is founded merely on an *arbitrary idea* of argumentativeness. If it be worth anything it should be shown that it tends to frustrate truth, and that can only be by its being equivocal as regards the *facts;* not by merely saying that the facts as stated amount to a proposition of law which *might* have been absolutely stated; (as, that defendant did not owe the money sued for;) that may have been so, but what purpose of truth is defeated—rather, how could the purpose of truth be better answered,—than by a plain statement of the facts? If they are *true* there is an end, without the expense of a trial; if *not* true, why the other party can put them to the proof, or state the truth himself. And of old, no objection would be allowed on such a ground; and a plea, if "argumentative" was *equivocating, i. e.*, such as the plea, in trespass, now expressly *sanctioned*, that plaintiff was not *possessed!* It was no objection that a man *told* the *whole story*, though he was not forced to do so. Well, but because pleadings have been set aside for objections not founded on truth, are they to be freed from objections *founded* on truth? Yet such would be the effect of either doing away with special demurrers or the rules on which they are founded. Besides, are those who think thus,

aware, that at common law all demurrers are "special;" and that the absurdity of a general demurrer, *i. e.*, an objecting to a pleading without assigning any reason, is only impliedly recognised by such corrupt statutes as have been alluded to? A "special" demurrer is the only *fair* demurrer, provided the objections specially stated are truthful; if not, don't overrule the demurrer because it is a "special" demurrer (which is its only virtue), but because it is a *bad* demurrer; as any demurrer must be, however special, and however clearly it may show a breach of any arbitrary rule, unless it appear that on the *particular* pleadings truth is frustrated by the fault. And one almost infallible test of this is, that which at common law existed, and which the Attorney-General's bill restores—the power of *amendment without costs*. This alone is almost enough to ensure at least a fair chance for the restoration of pure pleading; since nothing promotes prolixity so much as the apprehension of technical objections; and if a man knows that an instantaneous amendment can be made, he will not take the trouble to make a technical objection; whereas, on the other hand, if a man refuse thus to amend, it is certain he is conscious of a flaw in his case which the flaw in his pleading is intended to cover: and the objection, however *apparently* technical, must be really material. Thus would often be shown the *fatal* effects of doing away with the power of objecting to pleadings for defects in form; defects which are often the "refuges of lies," and the last resources of fraud. The "exact truthfulness" is not to be done away with along with "the exquisite subtlety." The great object is to distinguish between them; and the only way of so doing is to look *carefully* (not captiously) at the pleadings, and allow ample scope for *objecting* to them, along with full power of free *amendment*. The result would be *plain, pure true pleading*, as at common law.

It follows from these principles, the Attorney-General's bill is good—(because consistent with the common law) except so far as respects the clause giving a loose liberty of replying to a plea by a general denial. This, it is conceived,

would be dangerous, if the plea be compelled (and *needless* if it be *not*) to state more than one matter; all, which, at common law, it *need* state.

It further follows that the courts should as much as possible restrain pleadings to some *single* substantial matter; (thus rendering several pleas usually unnecessary:) and prevent a party from "putting to the proof" any matter not *necessarily* decisive, and not more in his opponent's knowledge than his own.

It is finally submitted that it should be provided, (1) that no costs be allowed in cases of amendment before or upon demurrer; (2) that several pleas shall be allowed only when the *court* is satisfied they are requisite, in the *particular* case, for the purposes of justice; (3) that no objection either as to proof or pleading shall be allowed, which might have been taken at an earlier stage; (4) that the judges have power to lay down rules in *conformity* with these principles of the common law; (5) that there shall be no *fees* not supported by actual *services performed.* Under such a state of the law, (the judges, of course making all requisite rules,) the result would be—(1) that there hardly ever would be a false plea; or, (2) a "technical" demurrer; or, (3) a failure of justice through failure of proof or failure in form; (4) that pleadings would be plain, *brief and precise*; the *proofs* narrowed, and the expense therefore greatly reduced; (5) that the time of the courts would be as much economized as the money of the suitors, so that there would be no *delay* in their decisions. But, (to sum up in a word,) neither these, nor any other amendments will prove effective unless those who *work* the system have *faith in truth.*

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